No. 89-931

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

PORTLAND AUDUBON SOCIETY, *et al.*,
Petitioners,

v.

MANUEL LUJAN, JR., in his official capacity as Secretary, United States Department of Interior,
and
NORTHWEST FOREST RESOURCE COUNCIL, *et al.*,
Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, HUFFMAN AND WRIGHT LOGGING COMPANY, FRERES LUMBER COMPANY, INC., LONE ROCK TIMBER COMPANY, INC., SCOTT TIMBER COMPANY, CLEAR LUMBER MANUFACTURING CORP., YONCALLA TIMBER PRODUCTS, INC., CORNETT LUMBER COMPANY, DOUGLAS COUNTY FOREST PRODUCTS CO., MEDFORD CORPORATION, AND ROGGE FOREST PRODUCTS, INC.

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QUESTION PRESENTED

Whether the Ninth Circuit erred in determining that section 314 of the 1988 Department of Interior and Related Agencies Appropriations bill bars judicial review in this case.

PARTIES BELOW

The following is a complete list of the parties named in the proceedings below:

Portland Audubon Society, Headwaters, Lane County Audubon Society, Oregon Natural Resources Council, The Wilderness Society, Sierra Club, Inc., Siskiyou Audubon Society, Central Oregon Audubon Society, Kalmiopsis Audubon Society, Umpqua Valley Audubon, and Natural Resources Defense Council, as plaintiffs-appellants below.

Manuel Lujan, Jr., in his official capacity as Secretary, United States Department of Interior, as defendant-appellee below.

Donald Hodel, in his official capacity as Secretary, United States Department of Interior, was a defendant-appellee below from 1987-1988.

Northwest Forest Resource Council, Huffman and Wright Logging Company, Freres Lumber Company, Inc., Lone Rock Timber Company, Inc., Scott Timber

Company, Clear Lumber Manufacturing Corp., Yoncalla Timber Products, Inc., Cornett Lumber Company, Douglas County Forest Products Company, Medford Corporation, Rogge Forest Products, Inc., Association of O&C Counties, and Benton County as defendant-intervenors-appellees below.[1]

[1] The following parent or subsidiary corporation (not reflected in the list of parties) has an interest in the outcome of this litigation: Roseburg Forest Products, Inc.

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STATEMENT OF THE CASE

This action arises out of a decision by the Oregon Director of the Bureau of Land Management ("BLM") not to issue a Supplemental Environmental Impact Statement ("SEIS") evaluating the effect on the northern spotted owl population in western Oregon of offering some 200 timber sales containing stands of "old growth timber." Petitioners brought suit in October, 1987, alleging that offering the sales without preparing an SEIS violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370. Petitioners also alleged violations of the Oregon and California Lands Act ("OCLA"), 43 U.S.C. § 1181, the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703, *et seq.*, and the Federal Lands Policy Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq.*

Between 1979 and 1983, the Oregon Director of the BLM adopted ten-year Timber Management Plans ("TMPs") for each of the BLM's seven districts in western Oregon. The BLM prepared an EIS for each of the seven TMPs as an integral step in the planning process. The EISs considered the environmental impacts of various timber management alternatives and

considered the potential effects of logging and habitat depletion on the northern spotted owl.

Each TMP adopts one of the alternatives proposed in its accompanying EIS. Each alternative considers different land use management options ranging from "maximum timber production" to "emphasis on protection of natural values." The alternative adopted in the TMP represents a choice among those differing land use alternatives. While the TMPs designate commercial forest land under BLM management for several different uses, the TMPs do not establish timber sale boundaries or require the BLM to sell any specific amount of timber. The TMPs decide the land use allocation of the forest and set the annual allowable harvest for each forest.

The EISs prepared for the TMPs predicted a decline in the population of northern spotted owls on BLM lands because the TMPs called for accelerated harvesting of certain old growth timber. The EISs predicted that the depletion of old growth stands would lead to a decline in the number of owls on BLM lands. The TMPs reflected this concern and adopted provisions to protect a specified number of owls.

In 1986, the BLM decided to adopt, by 1990, new

Coordinated Resource Management Plans for western Oregon, to replace existing TMPs. At about the same time, pressure from various environmental groups pointing to recent publications predicting the extinction of the northern spotted owl prompted the BLM to prepare an Environmental Assessment ("EA") analyzing whether new information warranted preparation of an SEIS to further assess the impact of timber harvests on the owl. While the EA was being prepared the BLM provided interim protection for the owl by restricting timber harvesting within a 2.1 mile radius of a known owl site.

On February 3, 1987, the spotted owl EA was completed. The EA concluded that the new information on the owl was too preliminary to support preparation of an SEIS and that the impacts of the planned timber sales on the northern spotted owl and its habitat were adequately considered in the original EISs. On April 10, 1987, the BLM issued its decision not to prepare SEISs. The decision was based on the fact that by the time the Coordinated Resource Management plans were adopted, more spotted owl habitat would be available than predicted under the EISs, and that options for protecting the owls could be considered under the new management

plans.

On June 10, 1987, petitioners appealed the decision of the BLM not to prepare a SEIS to the Interior Board of Land Appeals and requested an immediate stay of all sales within 2.1 miles of an identified spotted owl nest. On February 28, 1988, the Interior Board of Land Appeals upheld the decision not to prepare a Supplemental EIS.

Four months earlier, on October 19, 1987, petitioners filed this action alleging violations of NEPA, the OCLA, MBTA and FLPMA. Defendants subsequently moved to dismiss petitioners' complaint on the grounds that judicial review of petitioners' claims was barred by section 314 of Pub. L. No. 100-202, 101 Stat. 1329 (1987), reenacted without change as § 314, Pub. L. No. 100-446, 102 Stat. 1825 (1988). Section 314 prohibits challenges to a BLM plan "solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan," Id., but permits challenges to "any and all particular activities to be carried out under existing plans." Id. On April 20, 1988, the district court granted respondents' motion to dismiss concluding that petitioners' challenges were based on new information.

On April 21, 1988, petitioners filed a notice of appeal and moved the Court of Appeals for an injunction pending appeal. The court granted the injunction on May 18, 1988, and ordered that the appeal be expedited. On January 24, 1989, the court affirmed in part the district court decision and in part reversed it. The court remanded the case for further proceedings to consider whether petitioners' suit was a challenge to "particular activities" permitted under section 314. *Portland Audubon Society v. Hodel*, 866 F.2d 302, 307-08 (9th Cir. 1989), A-32 - A-33 ("PAS I" appearing as Petitioners' Appendix B at A-24. Citations to "A-n" herein refer to Petitioners' Appendix).

On remand, and after further factual development including a two-week hearing on the parties' cross-motions for summary judgment, the district court determined that petitioners' non-NEPA claims were barred by the equitable doctrine of laches and that the NEPA claim was not subject to judicial review under section 314 as the suit was not "a challenge to particular activities to be carried out under existing plans." The court granted respondents' motion for summary judgment.

Petitioners appealed and, on September 6, 1989,

the Ninth Circuit affirmed the district court's ruling that section 314 bars judicial review of the NEPA claim, but reversed the district court's holding that the MBTA, OCLA and FLPMA claims were barred by laches and remanded the case for trial on those issues. *Portland Audubon Society v. Lujan,* 884 F.2d 1233 (9th Cir. 1989) ("PAS II" appearing at A-1, *et seq.*).

On October 23, 1989, Congress enacted section 318 of the Department of Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121 (1989) ("§ 318"). Section 318 was the product of a lengthy negotiation process among environmentalists, the timber industry and Congress aimed at bringing an end to the timber supply crisis. In addition, section 318 was designed to moot this action and related litigation filed in the western district of Washington[2] and narrowly restrict timber sale challenges during fiscal 1990. On November 9, 1989, respondent Lujan moved to dismiss the case on the grounds that the action was rendered moot by section 318, others joined thereafter. On December 21, 1989, the district court granted

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[2] *Seattle Audubon Society v. Robertson*, Civ. No. 89-160, *Washington Contract Loggers Assoc., et al. v. Robertson*, Civ No. 89-99.

respondents' motion to dismiss, determining that section 318 rendered the case moot. *Portland Audubon Society v. Lujan*, No. 87-1160-FR, Op. at 10 (D. Or. December 21, 1989).

On December 5, 1989, petitioners filed this Petition for Writ of Certiorari to the Ninth Circuit challenging that portion of the Court of Appeals' decision which holds that section 314 bars petitioners' NEPA claims.

REASONS FOR DENYING THE WRIT

I. SECTION 314 IS A MEASURE OF LIMITED SCOPE AND DURATION; ITS INTERPRETATION DOES NOT PRESENT SIGNIFICANT ISSUES OF GENERAL IMPORTANCE.

The decision of the Ninth Circuit in this case does not present issues of sufficient significance to warrant review by this court. The decision does not implicate important principles regarding the interpretation of federal statutes. It does not create any division of authority among the circuits. *Compare Traynor v. Turnage*, 485 U.S. 535 (1988). Nor does it involve provisions of federal law which have been, or are intended to be, enduring. *See Crawford Fitting Co. v. J.T.*

Gibbons, Inc., 482 U.S. 437 (1987). Rather, the decision involves the application by a single circuit of language temporarily barring challenges to management plans which affect only western Oregon and which are scheduled to be replaced. *See discussion, supra*, at 4.

Petitioners would have this Court believe that the scope and significance of the Ninth Circuit's decision somehow exceeds the scope and duration of section 314 itself. But this contention is transparently false. The language employed by section 314, as the Court of Appeals noted, is "extraordinary." *PAS I* at A-29[3] The language bars challenges to TMPs but not to particular activities under the TMPs. This unique language

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[3] The pertinent portion of section 314 provides:

> Nothing shall limit judicial review of particular activities on the lands: Provided, however, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: Provided further, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

precludes decisions concerning section 314 from having any important general application.

The circumstances giving rise to the adoption of section 314 are also unique. The transition by BLM from one 10-year planning cycle to the next was being disrupted by a "precipitous increase in timber sale appeals and threats of litigation, especially on BLM lands in western Oregon." S. Rep. No. 100-165, 100th Cong., 1st Sess. 11-12 (1987). As a consequence, BLM was hindered in its "ability to prepare and implement new plans . . . ." *Id.* Section 314 was "intended to prevent the existing management plans from being enjoined in their entirety, solely on the basis that they are outdated, and allow activities to continue under existing plans pending the completion of new plans." *Id.*

The transitory nature of the problem section 314 was intended to address underscores the ephemeral nature of the issue this Court is asked to address. Work on the new BLM plans has already begun. *See, e.g.,* 51 Fed. Reg. 30, 718-19 (1986). The plans will consider various options for management of the forest resources in western Oregon. They will be informed by new analyses of the environmental impacts--including impacts on spotted owls--likely to be associated with various

management options. Should the BLM fail sufficiently to consider those impacts, that failure may form the basis of new challenges to the new plans.

Additional review of section 314, as urged by the petitioners, will not speed that process. It will not clarify that process. And petitioners do not intend by this action to do either. Instead, they seek to recast the balance reflected in TMPs adopted a decade ago and to shelve those existing plans while they pursue the change. *See PAS II* at A-17.

With or without petitioners' challenges, however, the BLM planning process goes forward. As it does, the significance of section 314 continues to fade, its "extraordinary" language grows increasingly narrow in its application, and the precedential value of its interpretation disappears. Even now, the question presented by the Petition is not sufficiently important to merit review by this Court.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH PRECEDENT OF THIS COURT REGARDING STATUTORY INTERPRETATION.

Petitioners assert that the decision of the Ninth Circuit is in conflict with decisions of this Court

recognizing a presumption in favor of judicial review of administrative actions. Petitioners are wrong.

While it is true that this Court has articulated a presumption favoring judicial review of administrative decisions, *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); *Block v. Community Nutrition Inst.*, 467 U.S. 340, 350 (1984); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), that presumption is rebuttable. Where Congress' intention to preclude review is "fairly discernible" from express language or otherwise, that intention has been given effect by this Court. *Block v. Community Nutrition Inst.*, 467 U.S. at 349 (specific language or specific legislative history will overcome presumption favoring review); *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112 (1987) (judicial review inconsistent with statutory scheme); *United States v. Erika, Inc.*, 456 U.S. 201, 209 (1982) (absence of provision for review within precise statutory scheme provides "persuasive reason to believe" that judicial review is not intended).

Applying this Court's precedents, the Ninth Circuit properly concluded that the express language and legislative history of section 314 bar review of claims such as those petitioners have asserted under NEPA.

PAS II at A-18. The court based its decision not only on careful consideration of the section's language and its legislative history, but also on a factual analysis of the nature of the petitioners' claim. In *PAS I*, the same panel of the Ninth Circuit which decided the instant matter concluded that "[t]here is little doubt about the intent of the sponsors of section 314. The sponsors intended to stop this particular lawsuit . . . ." *PAS I* at A-31.[4] The issue for the court was whether Congress had expressed that intention clearly enough to accomplish its goal. *Id.* The determination of that issue, in the appellate court's view, depended upon whether the

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[4] Contrary to petitioners' assertions, Pet. at 12-15, the court in *PAS II* did not depart from its views as to Congressional intent expressed in *PAS I*. *Compare PAS I* at A-29 *with PAS II* at A-18. Even if this were not true, a conflict of opinion within a single circuit would not provide sufficient reason to grant the writ. *See Davis v. United States*, 417 U.S. 333, 334 (1974). Moreover, because the same panel decided *PAS I* and *PAS II*, no intra-circuit conflict can be said to exist at all. Petitioners' additional argument that the circuit court was barred from referring to the legislative history accompanying the 1988 enactment of § 314, Pet. at 16, is also baseless. No settled judicial interpretation of section 314 contradicts the statements of legislative intent accompanying the 1988 reenactment. *Cf. Pierce v. Underwood*, __ U.S. __, 108 S.Ct. 2541, 2551 (1988). In addition, the 1987 legislative history is consistent with 1988 legislative history as well as the Ninth Circuit's decision. Finally, Petitioners apparently concede that the question they present is whether the 1988 enactment of section 314 bars the NEPA claim they have raised. Pet. at i. Thus the intention of Congress in reenacting that measure is relevant to the interpretation of section 314.

petitioners' "challenge is to the plan or to particular activities." *PAS I* at A-37.

The court remanded the matter to the district court with instructions that it determine whether petitioners' challenge to approximately 200 BLM timber sales constituted a challenge to "particular activities" (and therefore fell outside the bar of section 314) or constituted a challenge to an existing plan and was barred by the provision. *PAS I* at A-30 - A-35, *PAS II* at A-18. After remand, the Ninth Circuit upheld the factual determination of the district court that the petitioners' NEPA claim was directed to the BLM plan:

> Here, if plaintiffs were to succeed on the merits of their NEPA claim, BLM would be required to suspend its management plans and prepare a supplemental EIS, addressing concerns about the northern spotted owl. . . . In this case, a supplemental EIS would consider the possible land use alternatives of designating more or less old-growth forest for "intensive timber management" or reserving it for spotted owl habitat. . . . That intentional trade-off [reflected in

> existing BLM plans] of owls for economic gain was precisely the land use decision which is being challenged by plaintiffs.

PAS II at A-17.

Based on its extensive review, and the findings of the district court, the Court of Appeals concluded that there "exists not only persuasive evidence of congressional intent, but an explicit statutory command precluding review." *PAS II* at A-18. Its analysis was both directed and controlled by decisions of this Court. Its conclusion conflicts with no decision of this Court.

III. NEW LEGISLATION CASTS DOUBT ON WHETHER RESOLUTION OF THE ISSUE PRESENTED WILL AFFECT THE OUTCOME OF THE CASE.

The Ninth Circuit's decision did not hold that section 314 barred all of petitioners' claims in this case. *PAS II* at A-19. The court determined that claims based on the OCLA, the FLPMA and the MBTA survived. On remand, however, the district court recently dismissed these claims as well, relying on section 318 of the Department of Interior and Related Agencies Appropriations Act, Fiscal Year 1990, Pub. L. No. 101-

121 (1989) ("§ 318"). *See* discussion, *supra*, at 4.

Section 318 provides in pertinent part:

> (a)(2) The Bureau of Land Management shall offer such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of one billion nine hundred million board feet for fiscal years 1989 and 1990 from its administrative districts in western Oregon.
>
> . . . .
>
> (b)(5) No timber sales offered pursuant to this section on Bureau of Land Management lands in western Oregon known to contain northern spotted owls shall occur within the 110 areas identified in the December 22, 1987 agreement, except sales identified in said agreement, between the Bureau of Land Management and the Oregon Department of Fish and Wildlife. Not later than thirty days after enactment of this Act, the Bureau of Land Management, after consulting with the Oregon Department of Fish and

Wildlife and the United States Fish and Wildlife Service to identify high priority spotted owl area sites, shall select an additional twelve spotted owl habitat areas. No timber sales may be offered in the areas identified pursuant to this subsection during fiscal year 1990.

. . . .

(b)(6)(A) . . . Congress hereby determines and directs that management of areas according to subsections . . . (b)(5) of this section on . . . Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for . . . the case *Portland Audubon Society et al., v. Manual Lujan, Jr.*, Civil No. 87-1160-FR. The guidelines adopted by subsection . . . (b)(5) of this section shall not be subject to judicial review by any court of the United States.

By adopting section 318, Congress has declared that BLM management of western Oregon lands meets the requirements of NEPA, the OCLA, the FLPMA and the MBTA if that management is carried out in compliance with section 318. Section 318 has completely disposed of this action for fiscal year 1990 without regard to the interpretation of section 314. There is no reason to further review section 314.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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